240

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No. 05-746

IN THE
SUPREME COURT OF THE UNITED STATES

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

TIMOTHY SORRELL,
Respondent.

On Writ of Certiorari to the
Missouri Court of Appeals

BRIEF OF *AMICI CURIAE* AMERICAN TRAIN DISPATCHERS ASSOCIATION, BROTHERHOOD OF LOCOMOTIVE ENGINEERS & TRAINMEN, BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, INTERNATIONAL BROTHERHOOD OF BOILERMAKERS & BLACKSMITHS, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, NATIONAL CONFERENCE OF FIREMEN & OILERS, TRANSPORTATION COMMUNICATIONS INTERNATIONAL UNION AND UNITED TRANSPORTATION UNION, BROTHERHOOD OF RAILROAD SIGNALMEN IN SUPPORT OF RESPONDENT TIMOTHY SORRELL

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT..... 4

ARGUMENT 5

I. CONGRESS IS THE PROPER VENUE FOR THE RELIEF PETITIONER SEEKS..... 5

II. BECAUSE PETITIONER EFFECTIVELY CONCEDED THE QUESTION UPON WHICH CERTIORARI WAS GRANTED AND ABRUPTLY CHANGED THE ARGUMENT TO ONE NEVER RAISED IN THE COURTS BELOW PETITIONER ASKS THIS COURT FOR AN ADVISORY OPINION..... 9

III. BY EFFECTIVELY CONCEDING THE ISSUE RAISED IN THE LOWER COURTS AND THE PETITION FOR CERTIORARI PETITIONER HAS RENDERED ITS CLAIM MOOT..... 10

CONCLUSION 13

TABLE OF AUTHORITIES

Cases: **Page**

Adams v. Robertson,
520 U.S. 83 (1997) (*per curiam*). 9

Adarand Constructors, Inc. v. Mineta,
534 U.S. 105 (2001). 8, 11, 12

City News and Novelty v. City of Waukesha,
531 U.S. 278 (2001). 12

Daimler Chrysler Corp. v. Cuno, ___ U.S. ___,
126 S.Ct. 1854 (2006). 10

Fletcher v. Union Pac. R.R. Co.,
621 F.2d 902 (8th Cir. 1980). 7

Gautreaux v. Scurlock Marine, Inc.,
107 F.3d 331 (5th Cir. 1997) (en banc). 6

Green v. River Terminal Ry. Co.,
763 F.2d 805 (6th Cir. 1985). 7

Hamdan v. Rumsfeld,
___ U.S. ___, 126 S.Ct. 2749 (2006)..... 8

Hernandez v. Trawler Miss Vertie Mae, Inc.,
187 F.3d 432 (4th Cir. 1999)..... 6

Hines v. Consol. Rail Corp.,
926 F.2d 262 (3d Cir. 1991)..... 6

Holbrook v. Norfolk S. Ry. Co.,
414 F.3d 739 (7th Cir. 2005)..... 7

Napier v. F/V DEESIE, Inc.,
454 F.3d 61 (1st Cir. 2006)..... 6

North Carolina v. Rice,
404 U.S. 244 (1971)..... 9, 11

Oglesby v. S. Pac. Transp. Co.,
6 F.3d 603 (9th Cir. 1993)..... 7

Patterson v. McLean Credit Union,
491 U.S. 164 (1989)..... 8

Preiser v. Newkirk,
422 U.S. 395 (1975)..... 12

Raines v. Byrd,
521 U.S. 811 (1997)..... 10

Richards v. Consol. Rail Corp.,
330 F.3d 428 (6th Cir. 2003)..... 7

Rogers v. Missouri Pacific Railroad Co.,
352 U.S. 500, (1957)..... 6

Shepard v. United States,
544 U.S. 13 (2005)..... 8

Summers v. Mo. Pac. R.R. Sys.,
132 F.3d 599 (10th Cir. 1997)..... 6

Syverson v. Consol. Rail Corp.,
19 F.3d 824 (2d Cir. 1994)..... 6

Tennessee Valley Authority v. Hill,
437 U.S. 153 (1978)..... 7

Turner Broadcasting System Inc. v. Federal Comm. Commission, 520 U.S. 180 (1997)..... 7

U.S. v. National Treasury Employees Union,
513 U.S. 454 (1995)..... 7

Vance v. Bradley,
440 U.S. 93 (1979) 7

Constitutional Provisions:

U.S. CONST. Art. III, § 2 ..... *passim*

Statutes:

45 U.S.C. §§51-60 ..... *passim*

Miscellaneous:

Letter from Chief Justice Jay and Associate Justices to President Washington (Aug. 8, 1793), *reprinted in* 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 1763-1826 (Henry P. Johnston ed., 1890) 8, 11

INTEREST OF THE *AMICI CURIAE*[1]

The American Train Dispatchers Association (ATDA), Brotherhood of Locomotive Engineers and Trainmen (BLET), Brotherhood of Maintenance of Way Employees (BMWE), International Brotherhood of Boilermakers and Blacksmiths (IBBB), International Brotherhood of Electrical Workers (IBEW), National Conference of Firemen and Oilers (NCFO), Transportation Communications International Union (TCIU), United Transportation Union (UTU), and Brotherhood of Railroad Signalmen (BRS) ("Rail Labor Coalition") are employee associations and labor unions organized under the Railway Labor Act, 45 U.S.C. §151 et seq. ATDA is the collective bargaining representative for the craft of train dispatchers; BLET, locomotive engineers; BMWE, way employees; IBBB, boilermakers; IBEW, mechanical and communications electricians; NCFO, roundhouse and mechanical shop laborers; TCIU, clerical employees and carmen; UTU, conductors and other train service employees; and BRS, signalmen. Petitioner and Respondent have consented to the Rail Labor Coalition's filing of a brief.

Most of the members of the Rail Labor Coalition represent the employees on all of the nation's major freight railroads, Amtrak and many of the regional and short line railroads. Some of them and their predecessors have existed since 1863 and most existed when the Federal Employers'

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[1] No person or entity other than *Amici Curiae* unions have made any monetary contribution towards this brief, and no counsel for any party authored this brief in whole or in part.

Liability Act (FELA), was enacted in 1908. Together, they represent well over 90% of the workers employed by the railroad industry and, separately or joined as here, have frequently appeared before Congress, administrative agencies such as the Federal Railroad Administration and the National Transportation Safety Board, and the courts on matters important to rail labor. Coalition members have participated in past FELA cases before this Court, such as *Norfolk & Western Ry. Co. v. Ayers*, 538 U.S. 135 (2003).

In virtually every congressional session during the past decade or two, Rail Labor Coalition members have been forced to resist lobbying efforts by the railroad industry to abolish or weaken FELA. For over 50 years, these efforts have failed and the 100-year-old Act has remained unchanged.

One of the major purposes of FELA was the promotion of safety within the railroad industry. *Sinkler v. Missouri Pacific R.R. Co.*, 356 U.S. 326, 329-30 (1958). In light of the safety purposes of the statute, the Court has recognized that FELA imposes a continuing and non-delegable duty on railroads to provide their employees with a safe place in which to work. *Bailey v. Central Vermont Ry. Co.*, 349 U.S. 350, 353 (1943). The position asserted by the railroad industry in this case would, as a practical matter, mean that railroads would no longer have this duty, and that there would be no effective deterrent to their negligence.

FELA was also intended as remedial legislation to facilitate recovery by workers who are injured or killed in the course of their railroad employment. *Consolidated Rail Corp. v. Gottshalk*, 512 U.S. 532, 543 (1994). Congress desired for injured railway workers to receive fair compensation for their injuries. In order to serve Congress' humanitarian purposes in enacting FELA, the Court has consistently held that FELA altered some harsh common-law rules and thereby "shif[ted] part of the human overhead of doing business from employees to their employers." *Ayers*, 538 U.S. at 145.

In this case, the Coalition has a clear interest in assisting

rail employees in protecting their rights and hopes to assist the Court in vindicating an important protection for railworkers and public safety that is threatened by the railroad industry's position in this case.

SUMMARY OF ARGUMENT

Petitioner argued both in state court and in its Petition for Writ of Certiorari to this Court that the standard applicable to railroad liability in a Federal Employers' Liability Act (FELA) case is lower than the common law negligence standard and that FELA does not require proof of proximate cause. Petitioner's arguments in the courts below and to this Court asserted that this lower standard should also apply to an employee's comparative negligence under FELA. In a remarkable shift in argument Petitioner now claims that the higher proximate cause standard should be applicable to both railroad and employee negligence under FELA. Amazingly, in shifting the argument petitioner has effectively conceded the issue upon which this Court granted certiorari. As a result petitioner asks this Court to act as a legislature and modify a statute without a valid basis for doing so on the record. Moreover, petitioner's sudden shift in argument raises serious questions under the Case or Controversy requirements of Article III of the Constitution.

Petitioner wants this Court to alter a longstanding interpretation of FELA, namely, that the Act does not require proximate cause in determining a railroad's liability for injury to a worker, and petitioner asks this court to do so without such arguments being raised at any time prior to Petitioner's Brief on the Merits before this Court. A more plain separation of powers problem is hard to imagine. A party is asking this Court to alter a longstanding interpretation of a statute—one of which Congress has long been aware—without having raised the issue in the courts below. Congress is the proper venue for the relief that petitioner seeks.

Because petitioner has effectively conceded the issue presented to this Court and addressed in the courts below, they are left asking this Court to rule on a matter for which there is no live case or controversy. In fact, they ask this Court for a ruling on a legal principle that is not raised in the record in this

case. Petitioner asks this Court for an advisory opinion. Of course, the longest settled principle of judicial restraint is that federal courts do not grant advisory opinions. Moreover, petitioner's abandonment and effective concession of the issue raised in the court below renders its case moot. The only live issue petitioner presents to this Court was not addressed or briefed until petitioner's brief on the merits before this Court. Thus, this Court should dismiss the writ of certiorari as improvidently granted, or in the alternative hold that petitioner is constitutionally barred from the relief they seek before this Court.

ARGUMENT

I. CONGRESS IS THE PROPER VENUE FOR THE RELIEF PETITIONER SEEKS

In the courts below and the Petition for Writ of Certiorari before this Court petitioner consistently argued that proximate cause was not an appropriate standard under FELA, and that the trial court erred in not applying the same relaxed negligence standard applied to railroads under FELA to a plaintiff's comparative negligence. (Pet. for Writ of Cert. at 9-12, 14 n.10); (Br. of Norfolk Southern on Appeal to the Missouri Ct. of Appeals at 2, 26, 30); (Mot. for Reh'g at 2, 3); (Mot. to Transfer to Missouri Supreme Ct. at 10). In so doing petitioner repeatedly argued that proximate cause is not the appropriate causation standard in a FELA case and as such a finding of comparative negligence should not require proof of proximate cause. (Mot. to Transfer to Missouri Supreme Ct. at 10); (Mot. for Reh'g at 2, 3). This Court granted certiorari

under the impression that this was petitioner's argument, because of course that is the argument petitioner made to this Court. (Pet. for Writ of Cert. at 2-17).

Now, in the eleventh hour, long beyond the time that petitioner could have timely raised the argument, petitioner asserts that proximate cause is the proper standard for both railroad liability and employee comparative negligence under FELA. *See generally* (Br. of Pet'r) (consistently arguing for a proximate cause standard under FELA). Such an argument runs counter to precedent in this Court and the interpretation of that precedent by every federal circuit court to reach the issue. *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 503, 506-510 (1957); *Napier v. F/V DEESIE, Inc.*, 454 F.3d 61, 67 (1st Cir. 2006) ("to prove causation," a plaintiff "need only demonstrate that [the defendant's] 'negligence played any part, even the slightest, in producing the injuries for which the plaintiff seeks damages'"); *Syverson v. Consol. Rail Corp.*, 19 F.3d 824, 826 (2d Cir. 1994) (the standard for fault is statutory rather than based purely in common law); *Hines v. Consol. Rail Corp.*, 926 F.2d 262, 267-68 (3d Cir. 1991) ("concept of causation under FELA is also broadly interpreted" so "injury need not be an immediate result of an accident"); *Hernandez v. Trawler Miss Vertie Mae, Inc.*, 187 F.3d 432, 436 (4th Cir. 1999)("....the Supreme Court has relaxed the standard of causation [under FELA] by imposing employer liability whenever 'employee negligence played any part, even the slightest, in producing the injury or death...."); *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331, 335 (5th Cir. 1997) (en banc) (The *Rogers* case used the term "slightest" to describe the reduced standard of causation between the employer's negligence and the employee's injury in FELA" cases); *Richards v. Consol. Rail Corp.*, 330 F.3d 428, 433-34 (6th Cir. 2003) (*Rogers* "adopted this relaxed standard in order to effectuate Congress' intent when it amended FELA in 1929 'to

preserve the plaintiff's right to a jury trial'") (quoting *Green v. River Terminal Ry. Co.*, 763 F.2d 805, 806 (6th Cir. 1985)); *Holbrook v. Norfolk S. Ry. Co.*, 414 F.3d 739, 741-42 (7th Cir. 2005) (plaintiffs have a "light burden of proof" in FELA cases); *Fletcher v. Union Pac. R.R. Co.*, 621 F.2d 902, 909 (8th Cir. 1980) ("test of causation under the FELA is whether the railroad's negligence played any part, however small, in the injury"); *Oglesby v. S. Pac. Transp. Co.*, 6 F.3d 603, 606-09 (9th Cir. 1993) ("the standard of causation required under the FELA differs from common-law proximate causation"); *Summers v. Mo. Pac. R.R. Sys.*, 132 F.3d 599, 606-07 (10th Cir. 1997) (*Rogers* "abandoned" proximate cause to determine liability under FELA).

Thus, petitioner asks this Court to grant a remedy on a matter not properly before the Court and upon which a long line of precedent—of which Congress is presumed to be aware—runs starkly against petitioner's argument. Simply put, this is a matter for Congress.

This Court has repeatedly recognized that separation of powers principles require that the Court not act as a legislature to amend statutes properly promulgated by Congress and the President, *Turner Broadcasting System Inc. v. Federal Communications Commission*, 520 U.S. 180, 195-96 (1997); *U.S. v. National Treasury Employees Union*, 513 U.S. 454, 479 (1995); *Vance v. Bradley*, 440 U.S. 93, 96-97 (1979); *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 194-95 (1978), especially when a long line of precedent militates against such a change. *Hamdan v. Rumsfeld*, ___ U.S. ___, 126 S.Ct. 2749, 2841 (2006); *Shepard v. United States*, 544 U.S. 13, 23 (2005); *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989). It is hard to imagine a clearer situation to which these constitutional principles should apply. Petitioner asks this Court for a remedy, and an interpretation of FELA, that they never argued for below and which they did not argue for in seeking

the writ of certiorari. Petitioner asks this Court for a remedy, and an interpretation of FELA, that it never argued in the courts below or sought in its writ of certiorari. Congress is well aware of Petitioner's hostility to the current long line of judicial precedent that contradicts petitioner's new argument here. Petitioner and other railroads have lobbied Congress virtually every year in an attempt to eviscerate FELA. Despite those efforts, *Rogers* and its progeny remain the law and Congress has not acted to amend the statute. Having failed with the Legislative Branch, Petitioners now ask this Court to legislate for them. This Court has repeatedly refused to so act. If Petitioner wants *Rogers* and the circuit court opinions interpreting it overruled they can lobby Congress again.

Moreover, in *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 105 (2001), this Court dismissed a writ of certiorari as improvidently granted in a situation where the petitioner abandoned its argument in the courts below and in the petition for writ of certiorari in favor of an argument that had not been addressed below. *Id.* at 107-110. That is precisely the situation here. The *Adarand* Court based its decision on prudential concerns, "the importance of an issue should not distort the principles that control the exercise of our jurisdiction. To the contrary, 'by adhering scrupulously to the customary limitations on our discretion regardless of the significance of the underlying issue, we promote respect...for the Court's adjudicatory process.'" *Id.* at 110 (citing *Adams v. Robertson*, 520 U.S. 83, 92 n. 6 (1997) (*per curiam*)). Thus, to seek relief the petitioner would have had to lobby the legislature and/or executive officers carrying out the legislature's will. Whether based on separation of powers or prudential concerns petitioner has no sound basis to assert an argument not raised below or in the petition for writ of certiorari.

II. BECAUSE PETITIONER EFFECTIVELY CONCEDED THE QUESTION UPON WHICH CERTIORARI WAS GRANTED AND ABRUPTLY CHANGED THE ARGUMENT TO ONE NEVER RAISED IN THE COURTS BELOW PETITIONER ASKS THIS COURT FOR AN ADVISORY OPINION

This Court's longest standing principle of judicial restraint is that Article III does not authorize this Court to grant an advisory opinion. *North Carolina v. Rice*, 404 U.S. 244, 246 (1971). In one of the first pronouncements by the Justices of this Court, the Justices wrote (in a letter to President Washington) that the Court could not answer questions raised by Secretary of State Thomas Jefferson because:

> [T]he lines of separation drawn by the Constitution between the three departments of the government...being in certain respects checks upon each other, and our being judges of a court in the last resort, are considerations which afford strong arguments against the propriety of our extra-judicially deciding the questions alluded to, especially as the power given by the Constitution to the President, of calling on the heads of departments for opinions, seems to have been purposely as well as expressly united to the executive departments.

Letter from Chief Justice Jay and Associate Justices to President Washington (Aug. 8, 1793), reprinted in 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 1763-1826, at 444, 488-89 (Henry P. Johnston ed., 1890). The Case or Controversy requirements of Article III continue to

preclude advisory opinions. *Rice*, 404 U.S. at 246.

Moreover, as recently as last term this Court unequivocally reinforced the importance of the case or controversy doctrines that have arisen under Article III. In an opinion by Chief Justice Roberts that ultimately addressed the issue of standing the Court held, "If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so." *Daimler Chrysler Corp. v. Cuno*, ___ U.S. ___, 126 S.Ct. 1854, 1860-61 (2006). The Court strengthened its support of the case or controversy doctrines further, "As this Court has explained, '[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.'" *Id.* at 1861 (citing *Raines v. Byrd*, 521 U.S. 811 (1997)).

What is remarkable about the current case is that petitioner has unmistakably put this Court in the position of dismissing the petition, holding against petitioner based on the fact that they are not constitutionally entitled to the remedy they seek, or granting an advisory opinion. While options one and two are quite viable, option three is not.

Why is it that petitioner must be seen as seeking an advisory opinion? Petitioner has in no uncertain terms conceded the issue upon which this Court relied in granting the petition for certiorari. (Pet. for Writ of Cert. at 9-12, 14 n.10); (Br. of Norfolk Southern on Appeal to the Missouri Ct. of Appeals at 2, 26, 30); (Mot. for Reh'g at 2, 3); (Mot. to Transfer to Missouri Supreme Ct. at 10). Petitioner has raised an argument on the merits of this case that was not briefed in its petition or raised in the courts below. *See generally* (Br. of Pet'r) (arguing for a proximate cause standard under FELA). Thus, there is no case or controversy for this Court to decide. The question which petitioner has briefed on the merits is not properly before this

Court and petitioner has effectively conceded the question that is before this Court. *Cf. Adarand*, 534 U.S. 105 (dismissing writ of certiorari as improvidently granted when petitioners abandoned the arguments raised in the lower courts and in the petition for writ of certiorari). For the Court to answer a question not properly before it on which there is no live case or controversy would be to grant an advisory opinion. *Rice*, 404 U.S. at 246; Letter from Chief Justice Jay and Associate Justices to President Washington (Aug. 8, 1793), reprinted in 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 1763-1826, at 444, 488-89.

III. BY EFFECTIVELY CONCEDING THE ISSUE RAISED IN THE LOWER COURTS AND IN THE PETITION FOR CERTIORARI PETITIONER HAS RENDERED ITS CLAIM MOOT

This Court has held that a case is rendered moot when a party concedes the primary issue upon which certiorari was granted. *City News and Novelty v. City of Waukesha*, 531 U.S. 278, 285-86 (2001); *cf. Adarand*, 534 U.S. 105. The mootness doctrine, like the advisory opinion doctrine, arises from the case or controversy requirement of Article III. *City News and Novelty*, 531 U.S. 278, 282-85. Simply put, when no valid issue remains to be heard in a case the underlying claims are rendered moot. *Preiser v. Newkirk*, 422 U.S. 395, 401-02 (1975). While it is unusual for a party to moot its own claim by switching its argument to one never raised below after certiorari

is granted, such is the effect of petitioner's tactics in this case.

It should not be forgotten that both in the courts below and in its petition for certiorari to this Court petitioner argued that the lower standard for negligence, which does not require proof of proximate cause, should apply to both railroads and employees under FELA. (Pet. for Writ of Cert. at 9-12, 14 n.10); (Br. of Norfolk Southern on Appeal to the Missouri Ct. of Appeals at 2, 26, 30); (Mot. for Reh'g at 2, 3); (Mot. to Transfer to Missouri Supreme Ct. at 10). Now petitioner argues that proximate cause should be the standard for both railroads and employees, (Br. of Pet.) (arguing for a proximate cause standard under FELA), but in the lower courts and petitioner effectively conceded that a lower standard applies to FELA defendants and simply sought that same standard to apply to FELA plaintiffs. By failing to brief or address the argument made below, and upon which certiorari was granted, in any significant way petitioners have rendered the underlying arguments moot.

CONCLUSION

For the reasons stated above, *amici curiae* respectfully request that this Court dismiss the writ of certiorari as improvidently granted, or in the alternative hold that petitioner is not constitutionally entitled to the relief they seek in this case.

Respectfully submitted,

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